

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 36

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ALAN A. ALEXANDER,
GARY W. ERICKSON
and PAUL F. SCHMIDT

Appeal No. 1999-1825
Application 08/799,258

ON BRIEF

Before MCQUADE, NASE, and BAHR, Administrative Patent Judges.

MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Alan A. Alexander et al. originally took this appeal from the final rejection of claims 2, 5, 8, 10, 13, 15, 16 and 19 through 28. The appellants have since canceled claims 15 and 16 and amended claims 19, 24, 25, 27 and 28. Thus, the appeal now involves claims 2, 5, 8, 10, 13 and 19 through 28, the only claims currently pending in the application.

Appeal No. 1999-1825
Application 08/799,258

The invention relates to a "lightweight and portable system for expediting the excavating of a military fighting position or foxhole" (specification, page 1). Claim 19 is illustrative and read as follows:

19. A compact, lightweight kit for the preparation of a two-man fighting position comprising in combination:

(a) a bucket-type, material retention auger system including a hollow material-retention bit and a plurality of handle extensions capable of being quickly assembled to bore holes in the earth;

(b) a plurality of explosive charges stored in containers that fit into holes bored by the auger system wherein the explosive charge containers nest within the hollow material-retention auger bit for storage and transportation;

(c) detonation means for connecting to each of said containers and remotely detonating the charges in each of said containers under control of a user; and

(d) a lightweight carrying pack for containing elements (a)-(c) in compact form.

The items relied upon by the examiner as evidence of obviousness are:

Walker et al. (Walker)	5,014,623	May 14,
1991		
Clements	5,275,245	Jan. 4,
1994		

The admissions in the appellants' specification (see, for example, pages 2, 3, 8 and 9) concerning conventional binary explosives and initiation systems for fusing and detonating explosives (the admitted prior art).

Claims 2, 5, 8, 10, 13 and 19 through 28 stand rejected under 35 U.S.C. § 103 as being unpatentable over Clements in

view of Walker and the admitted prior art.

Reference is made to the appellants' main and reply briefs (Paper Nos. 30 and 34) and to the examiner's answer (Paper No. 33) for the respective positions of the appellants and the examiner regarding the merits of this rejection.

Clements, the examiner's primary reference, discloses a bucket auger 10 "for boring relatively small diameter holes in the ground to [a] depth of several feet to facilitate placement of an explosive charge to that depth. A primary use of this operation is to explosively create a foxhole for military use" (column 3, lines 45 through 49). The bucket auger, which is designed for compact storage and transport, consists of a T-shaped handle 12, two handle extensions 14 and 16 and an elongated cylindrical body 18 having openings 24 along its length, cutting blades 20 at its distal end and a female connection 22 for the handles/extensions at its proximal end. Clements teaches that

[t]he auger would produce an approximately 3.25" diameter hole up to 42 inches deep. An explosive charge can be introduced to the bottom of the bore which can after detonation explosively produce a fox hole [of] sufficient depth and volume to contain at least one soldier.

In the preferred embodiment the entire tool, bucket auger 10 [i.e., cylindrical body 18], handle 12, extensions 14 and 16, can be made to be five pounds or less which can be back packed by a soldier or personnel [column 9, lines 3 through 11].

Independent claims 19 and 24 recite a "kit" comprising in combination a bucket-type auger system, a plurality of explosive charges, detonation means and a lightweight carrying pack for containing the foregoing elements. Clements' back-packed assembly of bucket auger components responds to the claim limitations requiring a kit comprising a bucket-type auger system and a lightweight carrying pack for containing the auger system. It does not respond, however, to the limitations requiring the carrying pack to also contain a plurality of explosive charges and detonation means. While Clements does describe the use of explosive charges in bores dug by bucket auger 10 to form a fox hole, such use does not embody, and would not have suggested, the inclusion of the explosive charges and their detonation means in the Clements carrying pack. Notwithstanding the examiner's determination to the contrary (see page 6 in the answer), this deficiency in Clements finds no cure in Walker's disclosure of the safety benefits of binary explosive munitions systems or in the

appellants' admission that binary explosives and suitable detonation means are known in the art.

Claims 19 and 24 further require the bucket-type auger system to include a hollow material-retention bit and the explosive charges to be stored in containers that nest within the hollow material-retention auger bit for storage and transportation. Independent method claim 26 contains similar limitations. Although Clements' elongated cylindrical auger body 18 constitutes a hollow material-retention bit, the prior art relied upon by the examiner does not teach and would not have suggested the storage and transportation nesting relationship between the charge containers and the bit required by the claims. As explained above, the prior art lacks any suggestion of adding explosive charges to the Clements carrying pack. Furthermore, the examiner's finding (see page 5 in the answer) that plural charge containers would inherently fit or nest within Clements' auger bit for storage and transportation purposes is unduly speculative and has no factual support in the applied prior art.

In light of the foregoing, the examiner's conclusion of obviousness with respect to the subject matter recited in

Appeal No. 1999-1825
Application 08/799,258

claims 19, 24 and 26 is not well founded. Accordingly, we shall not sustain the standing 35 U.S.C. § 103 rejection of claims 19, 24 and 26, or of claims 2, 5, 8, 10, 13, 20 through 23, 25, 27 and 28 which depend therefrom, as being unpatentable over Clements in view of Walker and the admitted prior art.¹

Finally, the following rejection is entered pursuant to 37 CFR § 1.196(b).

Claims 26 through 28 are rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter the appellants regard as the invention.

Clause (b) in method claim 26 sets forth the step of "preparing detonatable explosive charges from individually non-explosive constituents contained in charge containers which nest within the hollow material-retention auger bit for storage and transportation in placing the prepared detonatable explosive charges in said containers as prepared explosive

¹ Upon return of the application to the technology center, the examiner should consider whether claims 10 and 24 are duplicate claims deserving of treatment in accordance with MPEP § 706.03(k).

charges" (emphasis added). The highlighted language does not logically flow from the immediately preceding language and thus does not make sense.

Claim 27 depends from claim 26 and recites the step of "mixing two ingredients to produce a binary explosive mixture."

Claim 28 depends from claim 27 and specifies a particular binary explosive. It is unclear how the step recited in claim 27 and further defined in claim 28 relates to the method steps recited in parent claim 26.

In summary:

a) the decision of the examiner to reject claims 2, 5, 8, 10, 13 and 19 through 28 under 35 U.S.C. § 103 is reversed; and

b) a new 35 U.S.C. § 112, second paragraph, rejection of claims 26 through 28 is entered pursuant to 37 CFR § 1.196(b).

This decision contains a new ground of rejection pursuant to 37 CFR § 1.196(b)(amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53,131, 53,197 (Oct. 10, 1997), 1203

Appeal No. 1999-1825
Application 08/799,258

Off. Gaz. Pat. & Trademark Office 63, 122 (Oct. 21, 1997)).

37 CFR

§ 1.196(b) provides that, "A new ground of rejection shall not be considered final for purposes of judicial review."

37 CFR § 1.196(b) also provides that the appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (§ 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner. . . .

(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. . . .

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

REVERSED; 37 CFR § 1.196(b)

Appeal No. 1999-1825
Application 08/799,258

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Administrative Patent Judge)	
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JEFFREY V. NASE)	
Administrative Patent Judge)	APPEALS AND
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Appeal No. 1999-1825
Application 08/799,258